

Service Date: December 12, 1988

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of)	TRANSPORTATION DIVISION
Montana Rail Link, Inc., Missoula,)	
Montana, to Discontinue its Agency)	
Operations at Superior/St. Regis,)	DOCKET NO. T-9188
Montana, and to Dispose of the)	
Depot Facilities.)	ORDER NO. 5907

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Edward A. Murphy, Datsopoulos, MacDonald & Lind, 201 West
Main, Missoula, Montana 59802

FOR THE COMMISSION:

Timothy R. Baker, Staff Attorney, 2701 Prospect Avenue,
Helena, Montana 59620-2601

BEFORE:

HOWARD L. ELLIS, Commissioner and Hearing Examiner

BACKGROUND

On January 26, 1988, Montana Rail Link, Inc. (MRL or Applicant), of Missoula, Montana, filed an application with the Montana Public Service Commission (Commission) seeking authority to discontinue its agency operations at Superior/St. Regis, Montana, and dispose of the depot.

Following issuance of proper notice, the Commission conducted a public hearing on April 19, 1988, in the 4-H Building, 5th and Pennsylvania, Superior, Montana. The parties stipulated that the Commission could proceed to issue a final order in this matter.

SUMMARY OF TESTIMONY

Testimony of Applicant

Mr. Orson Murray, appeared and testified in support of the application. Mr. Murray is the Manager, Operations Specialist, in the operations department. Mr. Murray is responsible for the administrative aspects of the railroad as they interrelate to operations, which includes the oversight of agency operations. Mr. Murray sponsored the following exhibit:

Exhibits D and E: Documents which are a compilation of information concerning the number of cars shipped, the type of commodity, and the amounts shipped per month, for

the years 1985, 1986 and 1987.

Mr. Murray described the derivation and significance of the numbers contained in Exhibit D. These figures are derived through the computer system on the basis of input at the centralized billing stations. This particular document was prepared on request of the MRL by the Burlington Northern statistical department. The first page shows shipments received and forwarded during 1985 to be a total of 323 cars of various commodities. The second sheet shows that in 1986, and again for various commodities, a total of 621 cars were received and forwarded. In 1987, 647 cars were received and forwarded. Mr. Murray testified that to his knowledge, there had not been any significant changes in these traffic patterns during 1988. Exhibit E shows that, on the basis of working days, the Superior/St. Regis agency has provided approximately 2.588 cars per working day (1987). Mr. Murray added that it was MRL's position that the Superior/St. Regis agency was profitable.

Mr. Murray offered a general description of agency functions on the MRL system. All agency functions are currently performed through the centralized agency located in Missoula, Montana. Mr. Murray stated that he was not aware of any problems for shippers which resulted from the MRL system whereby the agency function is actually handled in Missoula. Representatives of MRL routinely contact shippers to make sure that there are no problems.

Mr. Murray added that since MRL has been in operation the local agent in Superior/St. Regis has not played any significant part in the traffic described by Exhibit D.

Mr. Thomas Arthur Jones, appeared and testified in support of the application. Mr. Jones is the Trainmaster for MRL in the Missoula terminal (and lines west), and resides in Hamilton, Montana. The responsibilities of this position include oversight of the agency operations at Superior/St. Regis, Montana. As Trainmaster, Mr. Jones is the first line operating officer for the railroad, and is responsible for train and crew operations, safety, rule compliance, etc.

Since Superior is located on MRL main line, service is provided on a regular basis. During the week there are nine scheduled daily trains. This does not include unit trains. On the weekends as many as 31 trains may pass through Superior. This service will not be affected by the closing of the agency.

Mr. Jones also discussed the occurrence of radio "dead spots" along the main line near Superior. He indicated that he has

never been informed of any recurring or consistent problem of this nature. Further, he indicated that any such problems occur primarily with smaller, hand-held radios. The dispatcher in Billings can directly contact any train along the main line in the area. Radio relays, or repeaters, are located every 30-40 miles to facilitate radio communications. Finally, the operating rules employed by the railroad, particularly the "red flag" rule, generally provide adequate protection for employees working on or near the tracks.

Testimony of Protestants

Mr. James T. Mular appeared and testified in opposition to the application. Mr. Mular is the State Legislative Director of the Transportation/Communications Union (TCU), and resides in Butte, Montana. According to Mr. Mular, the Transportation/Communications Union has an existing labor agreement with the Applicant which covers the scope of services that a rail agent performs with MRL. The agreement provides for two clerical pay classifications. However, MRL has subcontracted with Express Services, an employment agency located in Missoula, Montana, to render agency telephone services in Superior/St. Regis. Their wage is 3.35 an hour (minimum wage).

Mr. Mular stated that he believes MRL has not complied with Section 69-14-202, MCA, which requires a successor railroad through a purchase to maintain and staff station facilities in Montana and to accept and receive freight by those agents. It wasn't until a show cause order was issued by the Commission that MRL provided the service under Montana law. According to Mr. Mular, Section 69-14-708, MCA, requires railroads to maintain records of accidents involving animals killed along the rights-of-way at a station located in the county where the railroad operates, by filing the station locality with the county clerk and recorder.

Such filing must assure that a station agency maintains a book record of such accidents.

Mr. Mular noted that MRL alleges the relief requested in this application is an effort to reduce the cost of transportation services. He asked whether or not the cost savings will pass on to the customer. Mr. Mular also added that the Applicant pleads opportunity cost savings without substantiating any impact of closure on profitability and savings.

Finally, Mr. Mular stated that he did not believe that MRL was in compliance with DOT placarding requirements and regulations. On cross, however, he testified that he was not aware of

any hazardous materials forwarded or received at Superior/St. Regis.

Mr. Rick Van Acken appeared and testified in opposition to the application. Mr. Van Acken is the legislative representative for the TCU, Lodge 43, in Missoula. Mr. Van Acken stated that in reality, the Superior/St. Regis agency has already been abandoned, since no service is being provided by the agent. If the service is not there, shippers are not going to call the agency.

According to Mr. Van Acken, the local agent plays an important function in troubleshooting and assisting with local needs. A longer period of operation for MRL is required to determine whether or not an agent is really necessary.

Public Testimony

Mr. Tim Sanders, St. Regis, Montana, appeared and testified. He is the shipping supervisor of DAW Forest Products, a shipper responsible for roughly 600 cars of lumber per year. He stated that service from MRL has been good, and very responsive to their needs. He has had no occasion to contact the local agent.

Mrs. Peggy Stevens, of Superior, Montana, appeared and testified. She is the manager of the Hill Top Motel, also in Superior. The motel generally receives one or two carloads of coal per year. Recently, one of these cars was misplaced. She could not be sure whether this incident occurred in October, 1987, or January, 1988. Contact was made with the local agent. Mrs. Stevens testified that even before the sale by BN, she always used the services of the local agent. The agent provided her with a toll free number for a central agency, and also helped her to place a tracer upon the missing car. In the past, the local agent has always notified her when the car has arrived. Further, the motel requires the car to be spotted to a specific location. The agent has always assisted with this service.

Anita Parkin, Superior, Montana, appeared and testified.

Mrs. Parkin is an undersheriff for Mineral County. She testified that from a law enforcement perspective, it is helpful to have a local agent. She related several instances wherein the local agent had played a key role in various law enforcement activities.

Representative Barry Stang, St. Regis, appeared and testified. Mr. Stang is a member of the volunteer fire department, and stated that the local agent plays an important role in area fire suppression activities. The local agent provides a means by which local authorities receive prompt notification of right-of-way

fires. Similarly, the local agent can provide for a quick response to problems involving hazardous materials.

Mrs. Tressie Fike, Superior, Montana, appeared and testified. Mrs. Fike is the manager-owner of Fike's Exxon, Superior. She stated that she is friends with the local agent and does not want her to lose her job.

Mr. Norman Boyd, Superior, Montana, appeared and testified. He testified that early this afternoon, he tried to go to church, but all of the crossings were blocked by trains. He stated that although he contacted the dispatcher in Billings, the crossings remained blocked over two hours later.

Mr. Francis Nelson, St. Regis, Montana, appeared and testified. Mr. Nelson was formerly employed by the Northern Pacific from 1958-72 as a telegrapher. During this employment, he served as the substitute local agent on several occasions. He stated that the railroad always stressed rail safety as being of overriding importance. Mr. Nelson testified that the roll-by inspections performed by the local agent were always very effective. Safety is still critical, and there is more need for inspection capability since the trains are not using cabooses. Mr. Nelson added that during his service as a local agent, he did have occasion to serve as a "radio intermediary" because of "dead spots." He stated that during his employment, he served as the relief agent on approximately five occasions.

Mrs. Elizabeth Neville Superior, Montana, appeared and testified. Mrs. Neville is currently employed as the local agent in Superior. Mrs. Neville referred to a log of her activities as the local agent. She indicated that she was concerned for the safety of both the rail employees and the general public, as well as the attendant loss of service and jobs in the community. From her log, Mrs. Neville estimated that on approximately 24 occasions she has relayed train messages because of radio dead spots. Similarly, on many occasions she has helped to cut crossings, and has observed trains as they passed by the depot. Mrs. Neville was required by MRL to keep this log of her daily activities. The Commission takes administrative notice of the contents of said log.

On cross, Mrs. Neville indicated that on several occasions, she has warned people to stay back from the tracks as trains approached. She added that although she works at the depot from eight to four p.m., five days per week, she has been called on weekends to assist with crossing problems. She added that there

have not been any emergency situations, however. In assisting with crossing problems, she is required to contact the dispatcher in Billings. Mrs. Neville stated that most, if not all of the crossings which were frequently blocked, were within the Superior municipal limits. She stated that generally such delays do not exceed 15-20 minutes, but added that blockades of longer duration do occur.

Mrs. Neville also testified regarding her service as a relay for radio communications through local "dead spots." She stated that she usually contacted the dispatcher in Billings, who in turn would contact the train crews. To her knowledge, the train crews in the area are often unable to contact either Missoula or other trains. They will often use the Superior agent as a relay.

This has occurred several times. On cross, Mrs. Neville stated that the dead spots also exist at night, during the period of the highest train frequency, and that no accidents resulted. She added, however, that the major problems with dead spots is between the train crews and work crews.

Mrs. Neville testified that by performing roll-by inspections, she had detected hot boxes, shifted loads, as well as many other problems with passing trains. She promptly advises the passing train of the problem, and on a few occasions, cars have been set out or other corrective action has been taken. There are hot box detectors 10 miles on either side of Superior. Again, the majority of the train traffic passes through Superior at night, when Mrs. Neville is not on duty.

Mrs. Neville testified that she had never received any instructions from MRL regarding her duties and responsibilities as the local agent. On one occasion in January, the trainmaster, Mr. Jones, asked for her assistance in spotting and removing a car for the Hill Top Motel. Specifically, Mrs. Neville provided Mr. Jones with a map of the tracks near the motel. This occasion is not the one described by Mrs. Stevens. Mrs. Neville stated that she has also provided lineups to train crews, which have been sent to her by the rail yard via a Fax Machine in the depot. She also stated that she has, on a few occasions, contacted shippers and the crews, as appropriate, to pick up cars.

DISCUSSION, ANALYSIS AND FINDINGS

This Petition to close the Superior/St. Regis agency is brought pursuant to 69-14-202, MCA, as amended by the 1987 Montana legislature. That statute reads in its entirety as follows:

69-14-202. Duty to furnish shipping and

passenger facilities. (1) Every person, corporation, or association operating a railroad in the state on January 1, 1987, or a successor thereto, shall maintain and staff facilities for shipment and delivery of freight and shall ship and deliver freight and accommodate passengers in such facilities as were maintained and staffed on January 1, 1987.

(2) However, if a person, corporation, or association operating a railroad demonstrates to the public service commission, following an opportunity for a public hearing in the community where the facility is situated, that a facility is not required for public convenience and necessity, the commission shall authorize the closure, consolidation, or centralization of the facility.

MRL's predecessor maintained an agency at Superior/St. Regis on January 1, 1987. Therefore, the only question to be considered is whether "public convenience and necessity" require that MRL continue to maintain the agency.

The term "public convenience and necessity" is not a formulaic standard, but rather must be determined from the facts in each case; the existing burdens on the railroad will be weighed against burdens that will be placed on shippers should the application be granted. It has always been the practice of this Commission that railroads should be allowed to practice economies when the benefits therefrom outweigh inconvenience and loss of service to the public. In approving applications to close

profitable agencies in the past, the Commission has noted that shipper testimony in such cases will be accorded great weight.

The major shipper in the area, DAW Forest Products, appeared in support of the application to close the agency. A smaller shipper, the Hill Top Motel, voiced some concerns regarding problems it had with train service. At least some of these problems, however, appear to have arisen while the Burlington Northern provided rail service. A carload of coal was delivered by MRL to the Hill Top Motel in January. The log records of Mrs. Neville reflect that on January 15, 1988, she received a phone call from the motel placing an order for the car. Mrs. Neville passed this information along to Mr. Jones, including a map containing special spotting instructions. The car was successfully delivered and picked up when empty. On balance, it would appear that the services being provided by MRL in the Superior area do not require the presence of a local agent. For the most part, the coal car was provided to the motel by MRL without any problems. The assistance offered by the local agent, primarily involving intermediate phone contact, could have been satisfied by use of the toll free member to the Missoula agency.

In their testimony before the Commission, Mr. Mular and Mr. Van Acken contended that MRL was in possible violation of

certain aspects of Montana law. The Commission finds nothing in the statutes referred to (specifically Sections 69-14-202 and 69-14-708, MCA) that would require the maintenance of a railroad agency in the absence of a finding of public convenience and necessity. On the contrary, Section 69-14-202(2), MCA, requires the Commission to authorize closure of a railroad facility unless it finds from the evidence that public convenience and necessity require the facility. See e.g. Docket No. T-9187, Order No. 5867 (Darby station closure).

There was a great deal of concern expressed over the possible existence of radio "dead spots" in the Superior area. It was suggested that the local agent serves as a critical relay for the movement of communication through the area, primarily between train crews and section crews working in the area. The smaller, hand-held radios used by such crews are particularly susceptible to these problems. Mr. Jones suggested that through the use of "repeaters" along the rail line, the dispatcher in Billings may engage in direct radio contact along the main line with train crews. It may well be that the use of the local agent as a radio relay is more a matter of preference, than necessity. The number of such contacts contained in the log maintained by Mrs. Neville would seem to cast doubt upon such a conclusion, as well as the

effectiveness of direct contact by the dispatcher. However, the uncontradicted testimony offered by Mr. Jones indicates that the railroad operates by a number of rules, particularly what is referred to as the "red flag" rule, which provide adequate protection for employees working on or near the tracks under such conditions.

The Commission generally has the authority to inquire into matters of health and safety on railroads. The role station agents play in the maintenance of safety operations of a railroad is a proper area of inquiry for the Commission. Safety matters may be noted at any hearing. However, in this proceeding, the evidence suggests that the role played by the agent is ancillary to the level of safety insured by the operating rules. Absent a further showing that the local agent is necessary to insure a minimum level of rail safety, the Commission is reluctant at this point to pursue this matter further.

Finally, the Commission notes the reoccurring problems with blocked crossings in the Superior area. The Commission directs the parties to Section 69-14-626, MCA, which limits the Commission's authority over extended crossing blockades to public crossings "outside of incorporated cities and towns." As to such crossings, the Commission is always open to the filing of a formal

complaint.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Montana Code Annotated, Title 69, Chapter 14.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to Montana Code Annotated Title 2, Chapter 4.

3. No set rule can be used to determine whether or not the public convenience and necessity require a given service to be performed. The facts in each case must be separately considered and from those facts the question is to be determined. See Chicago, M. St. P. and P.R.G. v. Board of Railroad Commissioners, 126 Mont. 568, 225 P.2d 346 (1953), cert. denied 346 U.S. 823.

4. Public Convenience and Necessity does not require the maintenance of the agency at Superior/St. Regis, Montana.

5. The Commission concludes that Montana Rail Link may remove the Superior/St. Regis depot. Prior to its disposal, MRL should determine whether the building is of historical significance and preserve it if it is historically significant or allow local governments in the area the opportunity to utilize the building.

The Commission directs Montana Rail Link to inform the Commission in writing of the disposition of the building.

ORDER

NOW THEREFORE IT IS ORDERED that Montana Rail Link's Petition to discontinue its agency and dispose of the depot facility at Superior/St. Regis, Montana is Granted.

IT IS FURTHER ORDERED that all objections and motions made during the hearing in this docket that were not ruled upon are denied.

IT IS FURTHER ORDERED that the Montana Rail Link Company shall apply 69-14-1001, MCA, as required.

IT IS FURTHER ORDERED that this Order be effective immediately and that a full, true and correct copy of this Order be mailed forthwith to the Applicant and all parties of record.

Done and Dated this 12th day of December, 1988 by a vote of

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.